

HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TIMOTHY LINEHAN, on behalf of Plaintiff  
and a class,

Plaintiff,

vs.

ALLIANCEONE RECEIVEABLES  
MANAGEMENT, INC.,

Defendant.

NO. 2:15-cv-01012-JCC

REPLY IN SUPPORT OF SECOND  
AMENDED MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P. 12(b)(6)  
FILED BY DEFENDANT PHYSICIANS &  
DENTISTS CREDIT BUREAU, INC. dba P  
& D COLLECTION SERVICES

Consolidated With:  
No. C15-1196-JCC (Mosby)  
No. C16-0025-JCC (Auxier)  
No. C16-0055-JCC (Jones)

**Noted for Hearing: Friday, August 12,  
2016**

**I. INTRODUCTION**

In the period since Plaintiff's Opposition was filed, Defendant Physicians & Dentists has not identified any district courts outside of Western Washington or appellate panels within the Ninth Circuit that have cited, with approval or not, the centerpiece of Mr. Auxier's argument against dismissal of his First Amended Complaint, the Seventh Circuit opinion in *Suesz v. Med-I*

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*Solutions LLC*, 757 F.3d 636 (2014). In fact, there appear to be no federal appellate circuits outside of the Seventh that have addressed the *Suesz* holding either.

Accordingly, Mr. Auxier's statement that the "relevant 'judicial district or similar legal entity' under the FDCPA is the 'smallest geographic area that is relevant for determining venue in the court system in which the case is filed,'" Opposition at 2 (ECF No. 119) (relying on *Suesz*), is most likely an overstatement of current law. Physicians & Dentists agrees that is the law in the Seventh Circuit. But Mr. Auxier has not established that a Seventh Circuit opinion is binding in the Ninth Circuit, or that *Suesz* somehow overrules or modifies *Fox v. Citicorp Credit Services*, 15 F.3d 1507 (9th Cir. 1994). *Fox* holds that a county is the unit of size for determining venue in the Ninth Circuit for the purposes of the FDCPA. See 15 F.3d at 1515.<sup>1</sup> With that conclusion, the *Auxier* lawsuit was properly filed in King County, the same county where Mr. Auxier currently resides. Physicians & Dentists believes it did not violate either applicable rules of the King County District Court or the venue provision of the FDCPA when the lawsuit was filed. Some or all of Physicians & Dentists' Rule 12(b)(6) Motion should be granted.

## II. SUPPLEMENTAL FACTS

### A. Plaintiffs have not shown that the *Suesz* opinion is being followed throughout the Ninth Circuit.

As a simple fact matter, Plaintiff does not appear to rely on the Declaration of Guy W. Bennett, ECF No. 53 (filed April 25, 2016), filed in opposition to a previous version of this Motion.

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<sup>1</sup> See also D. Mark, Note and Comment: SUESZ V. MED-1 SOLUTIONS, LLC: DEFINITION OF A JUDICIAL DISTRICT IN THE VENUE REQUIREMENT OF THE FAIR DEBT COLLECTION PRACTICES ACT, 36 N. III. U. L. Rev. 83, 106 (Spring 2016) ("I am in agreement with the concurring and dissenting opinions in *Suesz*, that this rule espoused by the *Suesz* majority, that a penalty can be imposed on debt collectors under the FDCPA who file state court actions in state courts where venue is proper, is likely unconstitutional as a violation of the Tenth Amendment").

1 In the section of Plaintiff's Opposition called "Background," ECF No. 119 at 2-4,  
 2 Plaintiff references the Auxier First Amended Complaint, the Congressional & Administrative  
 3 News ("USCCAN"), the Seventh Circuit *Suesz* opinion, a treatise called Consumer Law Sales  
 4 Practices, news articles from the Indianapolis Star and the Wall Street Journal, the venue statute  
 5 from the FDCPA, and the local King County Rules applicable to courts of limited jurisdiction.

6 Mr. Auxier does not identify any courts in the Ninth Circuit, other than senior federal  
 7 district judges John C. Coughenour and Robert S. Lasnik of the Western District of Washington,  
 8 that have appeared to follow the Seventh Circuit holding in *Suesz*.

9 **B. Legal commentary critical of the outcome in *Suesz*.**

10 In his law review article, Mr. Mark offers an analysis of the intent of Congress in  
 11 discussing "judicial district" as used in the Fair Debt Collection Practices Act. Physicians &  
 12 Dentists offers this quotation because it summarizes how venue issues under the FDCPA should  
 13 be analyzed in the opinion of the Defendant:

14 It is often said that the simplest explanation is usually the correct one. Here, it  
 15 seems that the easiest explanation would be that the Federal Congress used  
 16 "judicial district" to refer to federal district courts, and "similar legal entity" to  
 17 refer to their corresponding state version since not all states structure or label their  
 18 trial level courts in the same way. Congress has used the phrase "judicial district"  
 19 in statutes and in Federal Rules of Civil Procedure in referring to federal district  
 20 courts. According to the United States Courts website, there are ninety-four  
 21 federal judicial districts. Most importantly for the purpose of this note, Congress  
 22 used the phrase "judicial district" frequently in the General Venue statute for  
 23 United States District Courts. Certainly, when Congress uses the phrase "judicial  
 24 district" in a statutory provision dealing with venue, such as § 1692i of the  
 25 FDCPA, one cannot help but think that Congress was referring to the same entity  
 26 that it referred to in legislation dealing with venue generally in the federal district  
 courts.

Thus, it would seem that the definition of "judicial district" is fairly straight  
 forward, and what would really be left to interpret is what under the statute  
 constitutes the corresponding "similar legal entity" in a state. In both Marion  
 County, Indiana and Cook County, Illinois there is one judicial circuit that is  
 comprised of the entire county, but also contains smaller courts that have been

created seemingly for the convenience of litigants and for the courts as well. The majority in *Suesz* seems to find that the Marion County Circuit and by reference Cook County Circuit constitute “judicial districts” under the act. These state circuits are the state equivalent of federal districts. So why then is this not the end of the inquiry? It would seem as though once a plaintiff has filed an action within a “judicial district” in which the debtor resides--which here would be any court in either county--that the plaintiff has complied with the statute.

Mark, Note and Comment: *SUESZ V. MED-1 SOLUTIONS, LLC: DEFINITION OF A JUDICIAL DISTRICT IN THE VENUE REQUIREMENT OF THE FAIR DEBT COLLECTION PRACTICES ACT*, 36 N. Ill. U. L. Rev. at 103-04 (citations omitted).

**C. Oral argument on this Motion.**

Defendant Physicians & Dentists withdraws its request for oral argument.

**III. LEGAL AUTHORITY AND ARGUMENT**

**A. It is not established that the *Suesz* opinion is the law of the Ninth Circuit.**

Under the established federal legal system the decisions of one circuit are not binding on other circuits. *See Minor v. Dugger*, 864 F.2d 124, 126 (11th Cir. 1989). The decision whether to adopt wholesale the circuit law of another court is a matter of judicial policy, not a constitutional command. *Hart v. Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001).

At most, this Court and the Honorable Robert S. Lasnik in this district have said that *Suesz* is “persuasive.” *See* Order Denying Motion to Dismiss filed by Defendant AllianceOne Receivables Management in Cause No. C15-1012 JCC, ECF No. 26 at 4 (“*Suesz* is not binding here”); *see also* Order Denying Defendants’ Motion to Dismiss in Cause No. C15-1196 RSL, ECF No. 85 at 8 (recognizing that this Court followed *Suesz* as persuasive authority in the *Linehan* case). Even so, it is far from a definitive holding, as noted by Judge Lasnik: “a state court’s structure *may affect* whether the filing of a debt collection suit violates the FDCPA,” and “a transfer provision *may play a meaningful role* in analyzing whether a debt collector violated has violated Section 1692i of the FDCPA.” *Id.* (emphasis added). In other words, this legal question will need more development in the Ninth Circuit or in the Supreme Court. Plaintiffs’

1 openly stated conclusion that *Suesz* controls here, Opposition at 2, lines 6-8 (ECF No. 119), is an  
 2 overstatement.

3 Moreover, Plaintiff's reading of the Ninth Circuit *Fox* opinion supplies meaning that is  
 4 not there. *See* Opposition at 10, lines 2-6 (ECF No. 119). *Fox* simply holds that enforcement  
 5 actions, such as an application for a writ of garnishment, are subject to the venue provision of the  
 6 FDCPA. *See* 15 F.3d at 1515. The *Fox* court also concluded, with little analysis, that  
 7 neighboring counties were two different venues for the purposes of the venue provision of the  
 8 FDCPA. *Id.* *Fox* **does not** analyze whether a suit must be brought within a particular location in  
 9 a particular county. Likewise, Judge Lasnik held that Plaintiffs in the *Mosby* case "read too  
 10 much from Fox," because the facts indicated that the debt collectors in the *Mosby* case filed suit  
 11 in the county where the Plaintiffs resided. Order Denying Defendants' Motion to Dismiss in  
 12 Cause No. C15-1196 RSL, ECF No. 85 at 6.

13 **B. Another court has held that *Suesz* does not result in retroactive application of**  
 14 **liability against a debt collector.**

15 Further caution about the reach of *Suesz* comes from the recent case of *Oliva v. Blatt*,  
 16 *Hasenmiller, Leibsker & Moore, LLC*, also decided by the Seventh Circuit. The Blatt law firm  
 17 filed a collection suit against plaintiff Oliva under the rubric of *Newsom v. Friedman*, 76 F.3d  
 18 813 (7th Cir. 1996), which was subsequently overruled by *Suesz*. As stated by the *Oliva* court,  
 19 "Under *Newsom*, . . . debt collectors were allowed to file suit in any of the Circuit Court of Cook  
 20 County's various municipal districts so long as the debtor resided in Cook County or signed the  
 21 underlying contract there." *Oliva*, 2016 U.S. App. LEXIS 10780 at \*3 (7th Cir., June 14, 2016).  
 22 Approximately a week after *Suesz* was decided, the Blatt law firm voluntarily dismissed its suit  
 23 against Oliva without prejudice. *Id.*, 2016 U.S. App. LEXIS 10780 at \*4. Oliva then brought an  
 24 FDCPA claim against Blatt in federal court, alleging that Blatt was retroactively liable under  
 25 *Suesz* because it filed suit in the first municipal district of the Circuit Court of Cook County,

1 rather than the fifth municipal district, where Oliva resided when the suit commenced. The  
2 parties filed cross-motions for summary judgment, and the district court denied Oliva's motion  
3 and granted summary judgment for Blatt. The district court ultimately concluded that Blatt was  
4 protected from liability under the FDCPA's bona fide error defense because it relied on *Newsom*  
5 in good faith. *Id.*, 2016 U.S. App. LEXIS 10780 at \*\*4-5.

6 On appeal, the Seventh Circuit affirmed the district court. "*Newsom*'s unambiguous  
7 holding expressly permitted Blatt to file suit exactly where it did. That *Suesz* later overruled  
8 *Newsom* does not change our analysis; *Suesz* may have created a retroactive cause of action for  
9 violations that preceded it, but it does not retroactively proscribe the application of the bona fide  
10 error defense. We therefore hold that Blatt's violation of § 1692i as interpreted by *Suesz* was the  
11 result of a bona fide error that precludes liability under the Act." *Id.*, 2016 U.S. App. LEXIS  
12 10780 at \*7.

13 *Oliva* has obvious import for the *Auxier* case. Even if the *Suesz* holding is fully adopted  
14 in the Ninth Circuit (which Mr. Auxier has yet to prove), it is an entirely different question to say  
15 that Physicians & Dentists violated 15 U.S.C. § 1692i as to Mr. Auxier. If Physicians & Dentists  
16 properly filed suit against Mr. Auxier under a colorable reading of King County District Court  
17 rules (which establish that, no matter where Physicians & Dentists *filed* the collection suit, the  
18 case was going to be *heard* in the Seattle Division of that court system under the KCDC's case  
19 handling scheme), no violation of the FDCPA should be found, because Mr. Auxier was sued in  
20 the county where he resides. *See Fox*, 15 F.3d at 1515.

21 **C. Plaintiff's civil conspiracy claim should be dismissed.**

22 Lastly, Plaintiff Auxier admits that this Court has already dismissed the civil conspiracy  
23 claim plead in the *Jones v. Audit & Adjustment* part of this case. Opposition at 23, lines 13-14  
24 and n. 14 (ECF No. 119). Based on a single sentence appearing in the last page of his brief, the  
25 Court can readily conclude that Mr. Auxier does not really expect a different outcome here.

1 The Court's ruling in relation to the *Jones* complaint was correct. Physicians & Dentists  
 2 respectfully requests that the Court follow its rationale from the earlier ruling and dismiss Mr.  
 3 Auxier's civil conspiracy claim. See Order On Motions to Dismiss by Defendants Audit &  
 4 Adjustment and Walker in Cause No. C15-1012 JCC, ECF No. 44 at 5; *Woody v. Stapp*, 146 Wn.  
 5 App. 16, 22, 189 P.3d 807 (2008) (to establish a claim for civil conspiracy, plaintiff "must prove  
 6 by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish  
 7 an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2)  
 8 the conspirators entered into an agreement to accomplish the conspiracy"; plaintiff Stapp's claim  
 9 dismissed because evidence offered only rose to level of speculation, e.g. "at times he saw one or  
 10 more of them together, sometimes behind closed doors"). See also *Somers v. Apple, Inc.*, 729  
 11 F.3d 953, 959-60 (9th Cir. 2013) (expounding on facial plausibility standard from *Ashcroft v.*  
 12 *Iqbal* and *Bell Atlantic v. Twombly*: "A claim is facially plausible 'when the plaintiff pleads  
 13 factual content that allows the court to draw the reasonable inference that the defendant is liable  
 14 for the misconduct alleged.' Plausibility requires pleading facts, as opposed to conclusory  
 15 allegations or the 'formulaic recitation of the elements of a cause of action,' and must rise above  
 16 the mere conceivability or possibility of unlawful conduct that entitles the pleader to relief")  
 17 (citations omitted).

18 Physicians & Dentists doubts Plaintiff could ever approach the facial plausibility  
 19 standard, by pleading actual facts that either it, or a retained attorney representing it, entered into  
 20 an open or covert agreement with the administration of the King County District Court and the  
 21 judges of that court to violate the FDCPA. According to Mr. Auxier, "P&D's knowledge was  
 22 evidenced by emails evidencing secret, ex parte communications by and among P&D, its  
 23 attorney, other debt collection attorneys and agencies, and a KCDC judge." Opposition at 23, n.  
 24 14 (ECF No. 119). These fantastic allegations, based on the First Amended Complaint, do not  
 25 include identification of the attorneys, judge, content of the email messages, or the dates of any  
 26



1 such alleged communications. Plaintiff has simply failed to meet the facial plausibility standard  
2 of *Iqbal* and *Twombly* in relation to the civil conspiracy claim; he speculates freely.

3 **D. Physicians & Dentists incorporates the void for vagueness argument submitted**  
4 **by Defendants Merchant Credit, Bakke, and Woehler.**

5 On August 12, 2016, Defendants Merchant Credit, Bakke, and Woehler submitted a very  
6 short reply (ECF No. 124) offering argument against the Auxier Opposition's void for vagueness  
7 argument (ECF No. 119 at 20-23). Rather than burden the court file further, Defendant  
8 Physicians & Dentists adopts the argument of Merchant Credit, Bakke, and Woehler as if fully  
9 set forth herein, also noting that Judge Lasnik has found the venue language in the FDCPA  
10 "ambiguous." *See* Cause No. C15-1196 RSL, ECF No. 85 at 4.

11 **IV. CONCLUSION**

12 For the foregoing reasons, and the reasons set forth in Physicians & Dentists' opening  
13 brief, this matter is properly dismissed under the framework of Fed. R. Civ. P. 12(b)(6), at least  
14 as to Plaintiff's civil conspiracy claim (Defendant believes the *Auxier* case should be dismissed  
15 entirely). If the Court is inclined to keep the FDCPA venue claim alive, it should explicitly state  
16 upon which authorities it is relying to do so.

17 Dated: August 12, 2016

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**CERTIFICATE OF SERVICE**

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on this 12<sup>th</sup> day of August, 2016, I caused a true and correct copy of the foregoing document to be served via CM/ECF system on:

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